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LETTER FROM U S EPA REGION III DISAGREEING WITH NAVY STATEMENT IN DRAFT
RECORD OF DECISION FOR SITE 9 AND SITE 10 AND ENCOURAGING ADDRESSING
ENUMERATED ISSUES NAB LITTLE CREEK VA
11/21/2001
U S EPA REGION III



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

By Electronic Mail and Facsimile Transmission to 757-322-4825

November 21, 2001

Waina McFarlane, Esq.
Department of the Navy
Atlantic Division
Naval Facilities Engineering Command
1510 Gilbert Street
Norfolk, Virginia 23511

**Re: Naval Amphibious Base Little Creek, Virginia Beach, Virginia
Draft Record of Decision for Sites 9 and 10**

Dear Ms. McFarlane:

I received your letter of November 16, 2001, regarding the draft Record of Decision for Sites 9 and 10 at the Naval Amphibious Base Little Creek in Virginia Beach, Virginia. EPA strongly disagrees with a number of statements in it.

Little Creek is an active Navy installation where hazardous substances have been, or threaten to be, released into soil and water. In May 1999, the U.S. Environmental Protection Agency (EPA) added Little Creek to the National Priorities List, a list of releases of hazardous substances that are the highest priorities for cleanup under the federal Superfund program.

Sites 9 and 10 were the first two sites at Little Creek for which the Navy proposed a remedy under Superfund. These sites were once sanitary landfills, used to dispose of the installation's trash. The trash included some hazardous substances. The sites have been covered with clean dirt and grass for some time and are now used as a golf course and driving range.

The Navy, EPA and the Virginia Department of Environmental Quality (VDEQ) agreed to propose a remedy for the hazardous substances deposited in these landfills. The Navy and the regulators agreed to propose a remedy of "institutional controls," which would restrict the use of Sites 9 and 10 to prevent or limit people's exposure to the hazardous substances in the landfills. For example, the draft Record of Decision calls for a prohibition on digging through the top layer of dirt to expose the landfills' contents.

The Navy provided EPA with a draft Record of Decision. EPA commented on the draft, in writing, in May and August of 2001. The Navy changed the draft to incorporate these comments.



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As a result of an unfortunate misunderstanding among staff at EPA Region III, Navy staff understood that EPA would approve and sign the draft Record of Decision after the Navy incorporated these comments. Navy staff had Capt. Steven W. Johnson sign the draft, believing that it was in final form and that EPA would sign it.

That was not the case. As soon as EPA staff realized the mistake, they informed the Navy that the draft Record of Decision was not in final form, and that EPA would be requesting additional changes. EPA staff then wrote additional comments on the draft Record of Decision. The last of those, a memorandum dated September 13, 2001, requested several changes that would better define the Navy's role in implementing, monitoring, maintaining and enforcing the institutional controls described in the draft.

You were kind enough to arrange a conference call on September 18 regarding EPA's requested changes. You and I, Bernard Schafer (Navy), Sally Dalzell (EPA) and Allison Abernathy (EPA) participated. At the end of that call, it was clear to me that the Navy was not willing to incorporate that EPA's requested changes into the draft Record of Decision. Your November 18 letter confirms my impression.

I understand from your letter that the Navy intends to sign the draft Record of Decision, publish it and note in the administrative record that certain changes requested by EPA have not been incorporated. This is unacceptable to EPA.

Please be aware that EPA must approve Records of Decision for federal facilities that have been included on the National Priorities List. EPA has not yet approved the Record of Decision for Sites 9 and 10 at Little Creek and does not plan to do so until additional changes are made to better define the Navy's role in implementing, monitoring, maintaining and enforcing institutional controls at Sites 9 and 10. Without EPA approval, the draft Record of Decision for Sites 9 and 10 is not a final decision document. It remains a draft, even if the Navy decides to sign it. As I read EPA's Final Guidance on Administrative Records for Selecting CERCLA Response Action, OSWER Directive 9833.3A-1 (1990), such drafts should not be published, nor included in the administrative record.

Land Use Control Assurance Plans

In your letter, you refer to a draft Memorandum of Agreement/Land Use Control Assurance Plan for the Naval Weapons Station Yorktown. This draft has been under negotiation for at least two years. Neither the Navy, the EPA nor the VDEQ has signed a final version of it. I understand that you and Mr. Shafer would prefer to describe the Navy's responsibilities for implementing, monitoring, maintaining and enforcing land use controls (like the ones in the draft Record of Decision for Site 9 and 10) in a Land Use Control Assurance Plan, in large part because such agreements cannot be enforced as a Record of Decision can be. For instance, if the Navy should fail to properly monitor, maintain or enforce a land use restriction, the Navy would not suffer monetary consequences under the draft Land Use Control Assurance Plan. By

contrast, the Navy might suffer financial consequences it were to violate the terms of a Record of Decision.

A land use control or institutional control cannot effectively protect human health or the environment over the short- or long-term if it is not properly implemented, monitored, maintained and enforced. Protection of human health and the environment is a fundamental requirement for any remedy selected under Superfund, see 42 U.S.C. § 9621(b), and all remedies must be carefully evaluated for their protectiveness in the short- and long-term. See 40 C.F.R. § 300.430(f). Thus, effective implementation, monitoring, maintenance and enforcement of institutional controls are essential and inextricably linked to protecting human health and environment as Congress directed.

Until recently, EPA was willing to rely on good faith assurances from military agencies, such as those contained in a Land Use Control Assurance Plan, to ensure that institutional control remedies effectively protected human health and the environment. Events have forced EPA to reconsider its approach. EPA is gathering mounting evidence about how susceptible institutional controls are to failing if they are not properly monitored, maintained and enforced. A recent survey of institutional controls at military installations has revealed widespread and serious problems. In one case, military personnel conducted bulldozer training sessions on a landfill, severely damaging the landfill cap. This was a flagrant violation of institutional controls contained in a Resource Conservation and Recovery Act permit, which prohibited digging into the landfill cap.

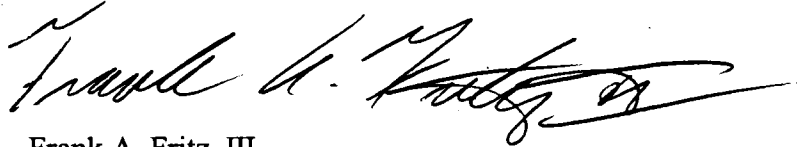
In addition, personnel at high levels within the Department of Defense have recently begun stating and acting on their position that, after a Record of Decision is signed, EPA has little or no role in overseeing certain Superfund response activities at military installations. This was a radical departure from past practice, when military installations took for granted that EPA would oversee response actions after the Record of Decision and occasionally take enforcement action to ensure the proper completion and maintenance of remedies selected in Records of Decision. Such oversight and enforcement is especially important for institutional controls, which are prone to failing if they are not properly maintained, monitored or enforced.

As a result of these and other events, EPA recently has begun to request that details of implementing, monitoring, maintaining and enforcing institutional controls be specified directly in Records of Decision, which traditionally have been enforced through collection of monetary penalties.

I and others at EPA want to address these issues through cooperation with the Navy to the greatest degree possible. We look forward to working with you to finalize the draft Record of Decision for Sites 9 and 10 at Little Creek.

If you have any questions, please do not hesitate to call me at 215-814-2664.

Very truly yours,

A handwritten signature in black ink, appearing to read "Frank A. Fritz, III". The signature is fluid and cursive, with a long horizontal stroke at the end.

Frank A. Fritz, III
Assistant Regional Counsel

cc: Paul Yaroschak
D. Olson
B. Harrison
G. Kohns
T.H. Hoffman
P.A. Rakowski
B.C. Grant
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